Germinsky Electrical Company, a Division of the Germinsky Group, Inc. *and* Local 675, International Brotherhood of Electrical Workers, AFL–CIO *and* Local 269, International Brotherhood of Electrical Workers, AFL–CIO *and* Local 358, International Brotherhood of Electrical Workers, AFL–CIO *and* Local 456, International Brotherhood of Electrical Workers, AFL–CIO *and* Local 400, International Brotherhood of Electrical Workers, AFL–CIO. Cases 22–CA–21193, 22–CA–21196, 22–CA–21208, 22–CA–21231, and 22–CA–21246

August 25, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On March 25, 1997, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs. Thereafter, the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

[1] The General Counsel, the Charging Party, and the Respondent have expressly and impliedly excepted to some of the judge's credibility resolutions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that the Respondent did not unlawfully refuse to consider and hire union applicants, we find it unnecessary to rely his metaphorical reference to surgeons and LPNs.

In adopting the judge's dismissal of the complaint, Chairman Truesdale does not rely on the judge's finding that the Respondent's president's letters opposing the Union's efforts to organize the Respondent is not evidence of union animus because they were not alleged to be violations of Sec. 8(a)(1). The Board has held that an employer's anti-union comments, while themselves protected speech, may nevertheless establish animus toward its employees' union activities. See *Ross Stores,* 329 NLRB 573 (1999); and *Lampi LLC,* 327 NLRB 222 (1998). Chairman Truesdale further notes that neither the General Counsel nor the Charging Parties have argued in this case that the Respondent's policy or practice of not hiring applicants with high current wage histories was itself discriminatorily motivated, or that it was inherently destructive of employee Sec. 7 rights. He therefore finds it unnecessary to address those issues in this case.

In adopting the judge's dismissal of the complaint, Member Hurtgen does not rely on all of the judge's reasoning. However, he finds that the General Counsel failed to establish the requisite antiunion animus to sustain the allegations of the complaint.

Bernard Mintz, Esq., for the General Counsel.
Maurice J. Nelligan, Esq., for the Respondent.
Gary A. Carlson, Esq., for the Charging Parties.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey, on December 2 to 5, 1996. The charges and amended charges were filed by each of the Unions on February 29, March 4, 11, 18, and 21, and April 10, 1996. A consolidated complaint and notice of hearing was issued by the Regional Director for Region 22 of the National Labor Relations Board on July 23, 1996. As amended at the hearing, the complaint alleged as follows:

> That during December 1995 and January through March 1996, the Respondent refused to consider the following employees for employment and refused to hire them:
>
> | | |
> |---|---|
> | Alex J. Bartolino | Joseph Martin |
> | Rhonda K. Browning | Joseph A. Nalbone |
> | William Bryan | James P. O'Donnell Jr. |
> | Paul Bulkivish | Paul Plesnarski |
> | Claude Sutton | Richard Ziarnowski |
> | John F. Donahue | Frank Terelle |
> | Susan Johnstonbaugh | Charles Kovach |
> | Andrew Kacvinski | Steven J. Towle |
> | James Kennovin | Norman Whiteley[1] |

FINDINGS OF FACT

I. JURISDICTION

It is admitted and I find that the Company is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Unions are a labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Company is engaged in the business of providing electrical services. Although it does some construction work, most of its work is in existing commercial or industrial spaces. In the present case, for example, its two major jobs during the relevant period were for a group of supermarkets owned by E. G. Edwards and for a group of stores owned by Bradley's, a department store chain. In the former instance, the Company was hired to change neon fixtures and bulbs in existing stores.[2] In the latter case, the Company was hired to rearrange lighting for displays.

The testimony of the Employer's witnesses was that the electrical services provided by the Company were in the middle range of complexity. Their testimony was that the Company does not require the number or type of electricians with the types of skills and experience that journeymen would provide, for example, in doing new construction. Although acknowledging that the Company has people who are capable of working on new construction, Bruce Germinsky, the ~~Company's president testified that it wo~~uld not normally bid for

[1] At the hearing, Local 338 moved to withdraw its charge with respect to Michael Corroa and Mark Toth. I granted that motion.

[2] This is called retrofitting. The market for this type of work was created, to some degree, by rebates provided by New Jersey utility companies to their customers if they changed their lighting systems to make them more energy efficient. What is involved is putting in new ballasts, installing reflectors and changing the neon bulbs.

president testified that it would not normally bid for that type of work.

As a general matter, the Company has a permanent work force, which it tries to keep together. It is a nonunion contractor, although Germinsky testified that in the past it has done some jobs where an arrangement was made with a local union of the IBEW to have the work force split 50–50 between Germinsky's employees and electricians provided by a local IBEW affiliate.

Bruce Germinsky testified that his grandfather founded the Company and that he took over when his father retired in 1994. Prior to returning to the Company, Germinisky had his own electrical contracting Company called E. J. Alrich, which worked under IBEW contracts. According to Germinsky, he had a good relationship with the IBEW and had few problems with them.

In 1994 Bruce Germinsky decided to wind down and close E. J. Alrich so that he could give his full time and attention to Germinsky Electrical. He thereupon became the president of the Respondent company and took over its management.

Germinsky testified that he became aware in 1994 that the IBEW was starting a campaign to organize the Company. He testified that he was told by some of his employees that they had been approached by Clem Vettone of Local 675 IBEW. He also testified that he heard from some of the other IBEW business agents that Germinsky Electrical was a "targeted" company. According to Germinsky, he heard that the IBEW was trying to get his employees to sign union authorization cards and he assumed that they would try to get an election. He also testified that he was aware that some of his employees were "salts" in that he knew that they were members of the IBEW who had applied for jobs and had been hired.

Faced with the organizing efforts, Germinsky hired Nelligan, a labor attorney. Germinksy testified that he took no retaliatory actions against employees whom he knew or suspected were members of the IBEW and made no other efforts to oppose the organizing campaign. Germinsky testified that he told his managerial staff to ignore the Unions and not to talk to employees about the Unions. There is, in fact, no evidence that the Company, *at any time*, engaged in any unlawful conduct in terms of threats, promises, interrogation, or retaliatory actions against any of its employees who either were members of or who supported the IBEW.

According to Germinsky, in the early part of 1995, he had a meeting with Ray Greely a business agent of Local 252 IBEW and with another business agent from a different local of the IBEW. He states that they told him that the IBEW was going to step up its union activity and that if Germinsky did not sign a contract they were going to put his company out of business. In response, Germinsky sent a letter to his employees dated May 5, 1995, which asserted that the IBEW was trying to coerce the Company into signing a contract and that it was out to destroy the Company if necessary. This letter was offered into evidence as General Counsel's Exhibit 8, presumably on the theory that it showed antiunion animus. Given the context, I do not reach this conclusion and I note that there is no allegation that any statements contained in the letter are illegal under Section 8(a)(1) of the Act.

On May 19, 1995, various of the locals of the IBEW wrote to Germinsky claiming that they had information that Germinsky Electrical was performing work of E. J. Alrich Electrical Contractors Inc., and that Germinsky was formed in order to avoid and circumvent the collective-bargaining agreements binding on E. J. Alrich. Each of the letters made a demand for a large amount of information about the operations of both companies including their owners, employees, and customers.

The Company reasonably interpreted the letters as being part of an effort to compel Germinsky Electrical and its employees to be covered by the E. J. Alrich collective-bargaining agreements. It sent a newsletter to its employees dated June 7, 1995, which stated inter alia;

> By now you are well aware that Local 675 has been trying to organize our work force and it is evident . . . that the union is not having much success. . . . Apparently, they are frustrated and have shifted gears!
>
> The IBEW has just given notice that it will attempt to have its labor agreement extended to cover our work force and become your bargaining representative. The union intends to accomplish this through a rigged arbitration, without any of our employees having any chance to vote in a secret ballot election.
>
> . . . .
>
> Fortunately, you have rights in this matter and so does the Company. We intend to assert those rights vigorously and *resist to the utmost* this attempted, illegal takeover by the union.

For the same reasons discussed above, I do not think that this letter or the statements contained therein evince an intention or predisposition to engage in unlawful conduct vis-à-vis the Company's employees or the Union.

Germinsky testified about another meeting in June 1995 that he had with certain representatives of the IBEW, wherein they made it clear that they wanted the Company to sign a statewide contract covering all of its employees and that they no longer would agree to compromise arrangements as described above where in circumstances where Germinsky worked on unionized projects, he could hire a portion of his work force from the local union and have the other portion being his own employees.

In the autumn of 1995, the Company was requested to submit a proposal to E. G. Edwards for retrofit work on 28 stores in New Jersey to commence on January 1, 1996, and to be completed in about 7 weeks; the deadline being forced by the application process for utility rebates. Germinsky testified that he decided to make a proposal for 17 of the 28 stores as the entire job was too big for his own work force. He testified that the work involved (1) removing and replacing existing florescent lamps; (2) retrofitting, which means removing and replacing ballasts and installing reflectors; and (3) altering the light pattern by adding or removing fixtures. According to Germinsky, the first of these functions is low-skill work and essentially amounts to changing light bulbs. He testified that the second aspect involves moderate electrical skill and that the third aspect requires the most skill.

In relation to the E. G. Edwards job, Germinsky testified that he figured that it would require a total of 42 people consisting of 7 crews who would work at seven sites at any given time. Each crew would consist of a leadman who would be a regular Germinsky employee who would be assisted by one or two electricians. The remaining people in each crew would consist of laborers or helpers who did not need to have electrical skills.

According to Germinsky, at about the same time, he got a call from Bradley's, which wanted Germinsky to reset the light-

ing in about 54 stores to commence in January 1996 and to be completed in about 10 weeks. As Bradley's was an old and good customer, Germinsky testified that he could not turn down this work even though it meant that doing both jobs at overlapping times would be beyond the Company's existing work force.

Germinsky testified that he decided to hire additional workers on a temporary basis to enable the Company to do these two jobs. As a consequence, the Company placed advertisements in a number of newspapers and put Carmen Grimaldi, its manager of estimating, in charge of hiring these additional people. The advertisements were run in local papers at various times and presumably reflected a need for people in a particular locality at a particular time. The advertisement was first run in the Trenton Times on January 13, 1996, and was last run in that same the Star Ledger, the Bergen Record, the Asbury Park Press, and the Home News & Tribune. The advertisement read:

> Established electrical contractor seeks electricians and experienced apprentices with a strong background in renovation and new installation. We offer competitive compensation and excellent benefits. For confidential consideration, FAX resume to (800) 788–4324 or call (908) 412–3518.

The Charging Parties, learning from Local 675 and its salts, that the advertisement came from Germinsky, decided to have various of their members apply for jobs. In this connection, the local unions sought out volunteers to apply for the jobs, albeit in one instance, Local 456 Business Manager Francis Leake sent in the resumes of five of his members without first talking to them. All of the resumes were sent in pursuant to the IBEW's salting program, which, among other things, allows an IBEW member to work for a nonunion company only under each local union's salting proposal. The IBEW's salting program, which is nationwide in scope, is described in the Respondent Exhibit 3 entitled, "Union Organization In the Construction Industry." Although it is not necessary to discuss the implications of this manual in the context of this particular case, I do note that there are instructions to employees hired as salts which might raise substantial issues under *NLRB v. Electrical Workers Local 1229,* 346 U.S. 464 (1953); and *Crystal Linen Service*, 274 NLRB 946, 948 (1985).[3]

A. Local 269 IBEW

Local 269's jurisdiction covers Mercer County, which included Trenton, New Jersey.

On January 14, 1996, Richard Aicher, a representative of Local 269 faxed three resumes to the phone number listed in the advertisement. The transmission report shows that they were received on the same date. The resumes were for Joseph Nalbone, Walter Marciante, and Alex Bartolino, all of whom are journeymen. The resumes were accompanied by a cover letter from Charles L. Marciante, the Union's business manager, who wrote that the three union electricians were highly qualified for the jobs advertised and were available for immediate employment. The letter went on to state that they were volunteer organizers.

Although testifying that members who agree to work as salts are told that they should accept employment at the terms offered by the employer, neither the cover letter nor the resumes indicate that these journeymen were willing to work at reduced wages and benefits. In this regard, a journeyman electrician earns about $28 per hour under the IBEW collective-bargaining agreements (exlusive of other benefits), whereas the people who were hired by the Company in this case, were offered wages between $8 and $21 per hour. (See table below.)

The Company did not respond to the faxed resumes and did not call any of the three individuals. The Union, for its part, did not follow up after sending the resumes and neither did the three men. It should be noted that all three journeymen were retired at the time their resumes were sent, in the sense that they were collecting IBEW pensions and were not registered with the hiring hall for employment. Aicher testified that notwithstanding their status as pensioners, they could have worked without losing their pension payments. None of these three individuals testified in this case.

B. Local 675

Having learned of the advertisement, Local 675 sought volunteers amongst its out of work members to apply for employment at Germinsky.

On January 17, 1996, the Union faxed resumes of Claude Sutton, James O'Donnell, and Frank Terrelle. On January 22, it faxed a resume of Paul Bulkivish. All of these people were journeymen and their resumes clearly indicated that they were affiliated with Local 675.

None of these people were contacted by the Company. Neither the Union nor any of these individuals followed up after their resumes were sent.

The evidence also indicates that Susan Johnstonbaugh faxed a resume to the Company on January 16, 1996, which indicated that she was a member of Local 675. She was not contacted by the Company and she did not follow up on her resume.

Richard Ziarnowski, who is an instructor in the Local Union's Joint Apprenticeship program, testified that he faxed his resume on January 17, 1996. He testified that he (unlike the others), followed up by calling the Company on January 18 and 19. In this regard, Ziarnowski testified that on January 19, 1996, he spoke to a man named Carmen (Grimaldi) who said that he was very busy and hadn't had a chance to review the resumes. Ziarnowski testified that on January 20, Carmen called him back and said that he had received his resume and would get back to him. According to Ziarnowski, he had another phone conversation with Carmen and they discussed the kind of electrical work being done by the Company. According to Ziarnowski, he would have accepted any job and would have accepted any wage offered. He did not, however, tell this to. Grimaldi, and in fact, his resume states that he was looking for a supervisory position. This was, according to Ziarnowski, the last conversation he had with Carmen and he was not hired or offered employment.

C. Local 358

This local is located in Perth Amboy, New Jersey, and its business manager is Joseph Jennings. Instead of sending resumes himself, he told various members that they should either call or send their own resumes to Germinsky. These were as follows:

[3] For example, at p. 16 of the manual, an employee who successfully obtains employment as a salt is supposed to report the company's customers to the union so that the union can go to these customers and "guarantee" that the use of the salt's employer will result in labor problems on their projects. Thus, in the absence of majority status and/or in the absence of a collective-bargaining relationship, salts are required to provide information to the union so that it can convince and/or pressure potential customers not to do business with the company that hires the salts.

Joseph Martin testified that on January 15, 1996, he called and spoke to Carmen. He states that he told Carmen of his qualifications and in response to a question, listed 3 contractors that he had worked for in the past. (All three being union contractors). Martin states that Carmen asked what kind of wages he was looking for, to which he said; "whatever you pay qualified journeymen electricians." According to Martin, Carmen said that he was interested and that he would call back. Martin states that Carmen never did call back. Martin did not send a resume to the Company and did not make any other follow up efforts to get this job. During the conversation, Martin did not tell Carmen that he was affiliated with the IBEW.

Paul Plesnarski testified that he called on January 15, 1996, and spoke to Carmen. (GC Exh. 13 is Plesnarski's phone bill showing that he made a call to this number on that date.) Plesnarski testified that Carmen asked if he was a journeyman and he responded that he was. He states that Carmen asked what kinds of work he did and he told Carmen that he did new, old, and retrofit work. According to Plesnarski, Carmen asked if he could also be a leadman and he said yes. Plesnarski listed two of his past employers, one of which, National On-Site Personnel, he states is a hiring agency that sends out temporary workers to nonunion employers. Plesnarski testified that pay was not discussed and that he was not asked to submit a resume. He testified that nothing was said either by himself or Carmen about unions. Plesnarski states that from what Carmen said, he understood that Carmen was going to interview a group of people. He states that he did not send in a resume because he thought that he would receive an invitation to interview and that he could bring in a resume at that time. This was the last contact between Plesnarski and the Company and Plesnarski did not follow up after this phone conversation. It should be noted that there is nothing in Plesnarski's testimony that would indicate that Carmen Grimaldi would have known that he was a member of the IBEW.

Norman Whitely testified that he called and spoke to someone he could not identify. He states that he asked how much the Company was paying and the person said that it depended on his qualifications. Whitely states that this person asked him to send in a resume and he did so on the following day by mail. There is no question but that anyone looking at his resume would realize that he was affiliated with the IBEW. He did not indicate, however, that he was willing to accept wages below what a journeyman normally gets. Whitely was never contacted by anyone from Germinsky and he made no further efforts to follow up on his resume.

James Kennovin testified that he had his mother fax in his resume on January 16, 1996. Although his resume does not indicate that he is affiliated with the IBEW, it does list five union contractors at which he worked as a journeyman. He testified that he left two messages at the Company's answering machine and received a beeper message that someone from the Company had tried to contract him. Kennovin never managed to get in touch with anyone from the Company and the Company did not, thereafter, get in touch with him.

Andrew Kacvinski Jr. testified that he called the Company on February 7, 1996, and spoke to Carmen for about 4 or 5 minutes. He states that he told Carmen that he was a member of Local 358 and had completed his apprenticeship. Kacvinski testified that he told Carmen that he had worked for union and nonunion employers and that Carmen asked him to send in a resume, which he did immediately. (He states that he called Carmen later in the day and Carmen acknowledged that he received the resume.)

Kacvinski testified that on February 10 he called Carmen who said that he should send another resume because he couldn't find Kacvinski's resume among the pile that he had. Kacvinski faxed his resume to the Company on February 12 and called Carmen to confirm that it had been received. That was the last contact between Kacvinski and Carmen or anyone else from the Company. It is noted that according to Kacvinski, there was no discussion of pay in any of these conversations, and he did not say that he was willing to accept whatever the Company was willing to offer.

D. Local 456

Francis Leake, the assistant business manager, testified that he saw the advertisement on January 16 and faxed the resumes of five of his journeyman members to the Company on January 18, 1996.

Leake states that the five people had gone through the COMET program and had volunteered to apply for jobs as salts. He sent in resumes for Rhonda Browning, John Donahue, Charles Kovach, Steven Towle, and another member named Marciano who is not alleged as a discriminatee in this case. Of the first 4, the resumes of Browning and Towle indicate on their face, an affiliation with the IBEW, whereas the affiliation of the other two might be inferred from their listed employment history.

Of the group, Browning was the only member who was out of work when their resumes were sent in. The others were actively employed at the time, but Leake asserts that they would have left their employers to work at Germinsky if they had been offered jobs. In this regard, he testified that he has an arrangement with union contractors to give leaves of absence to his members if they volunteer to engage in salting activity. I should also note that. Leake sent in the resumes of Towle and Donahue before telling them that he was doing so. (He states that they had previously given him permission to do this.) He states that he told Browning and Kovach that he was sending in their resumes on the same day that he sent them and that they said this was okay with them.

The Company did not respond to any of these resumes and there is no evidence that either the Union or the individual members followed up after their resumes were sent.

E. Local 400

By letter or fax dated January 24, 1996, Bill Bryan a journeyman member sent his own resume to the Company, which indicates in its body that he was affiliated with Local 400 IBEW. He also sent a cover letter, which stated: "I am ready, willing and able to go to work immediately, at your conditions and rate." Assuming that this was sent by letter and placed in the mail on that date, it would probably have been received anywhere from Friday, January 26 to Wednesday, January 31. What is unusual about this letter in relation to all of the other resumes is that. Bryan is the only one who made it clear that he would be willing to accept a job at the Company's wages and conditions.

The Company did not respond to Bryan's resume and he did not follow up on it either.

In addition to the above, the General Counsel presented a witness, Joseph Camporeale, who applied for a job at Germin-

sky and was not a member of the IBEW or any of the Charging Party locals.

F. The Testimony of Joseph Camporeale

Camporeale testified that he received his apprenticeship training at Local 3 IBEW in New York, but moved to Florida before becoming a journeyman. He states that he relocated to New Jersey in January 1996 and when he saw the advertisement, he called and spoke to Carmen. According to Camporeale, he was asked about his experience and said that he had done retrofits for florescent bulbs and ballasts, which was the job that the Company was doing for E. G. Edwards. Camporeale testified that when he asked for $20 per hour, Carmen said that he didn't think that this would be a problem given Camporeale's experience.

Thereafter, Camporeale was interviewed by Carmen on February 8, 1996, and on his application Carmen Grimaldi wrote that he considered offering him a job at $17.50 per hour. According to Camporeale, Carmen asked if he had been a Local 3 apprentice and he responded that this was where he got his training. After discussing his move to Florida and his work there, Camporeale states that Carmen said; "[Y]ou're' not a member of the Union anymore?" Camporeale states that he said that he was not, and that Carmen said that he would get back to him over the weekend. Camporeale also testified that he told Carmen that if he didn't get $20 per hour, he might as well stay in Florida and not have to buy a coat.

According to Camporeale, Carmen did not call, and he managed to get an offer from another company for $17.50 per hour. He states that when he called Carmen and told him of the other offer, Carmen said that he could offer only $15 per hour. Camporeale told Grimaldi that if Germinsky matched the other company's offer, he would rather work there. In response, Carmen said that he could not match the offer and wished him luck.

Frankly I do not think that Camporeale's testimony tends to show much of anything for either side. On balance, the import of his testimony was that he was offered employment but insisted on receiving more than the Company was willing to offer for the particular job at issue. When he later came back with a counteroffer to work for $17.50 an hour, Carmen told him that the Company's best offer would be $15 per hour. At most, this evidence tends to show that Carmen refused to offer an amount of money, which was acceptable to a man who once was, but was no longer affiliated with the IBEW. The fact that in discussing Camporeale's past work experience there was some talk about the fact that he had learned his trade through an IBEW apprenticeship program hardly indicates anything unusual. Nor is the testimony that Carmen asked if he was still affiliated with the IBEW anything other than innocuous.

G. The Employer's Position

Carmen Grimaldi testified that because of the unusual situation of having this overload of work due to the simultaneous contracts for two large jobs, he was given the additional task of interviewing and hiring a temporary work force to handle this overflow. He testified that the advertisements were placed in several newspapers over a period of about 2 months and that he answered phone calls and reviewed resumes when he could find time to be in his office. He testified that there were about 300 inquiries made for these jobs, of which about 200 were resumes faxed into his office. According to Grimaldi, he spent a minimal amount of time reviewing each of the resumes because of the press of his other work. He states that the success of a particular applicant was determined, to some degree, not only by his or her resume and interview, but by the luck of timing or persistence. That is, if suitable resumes came in during a week when people were needed, the people who sent in their resumes at that time had a better chance of being interviewed and hired.

Grimaldi testified that the jobs were either helper jobs or middle level electrical jobs. That is, none of the jobs required the full knowledge or experience of an electrical journeymen and some of the jobs required no electrical experience at all. In this respect, Grimaldi testified that he intended to offer, and did in fact offer wages and benefits at rates which were far below what a journeyman would normally receive. He also testified that he was not interested in hiring journeyman who, in his opinion, would be overqualified.

The parties stipulated to a list of people who were hired by the Company and who were assigned to work on the E. G. Edwards jobs. This was General Counsel's Exhibit 20 and it showed:

Name	Date of Hire	Rate	Termination Date
Anthony Vella	12/6/95	13.50	2/19/96
John Hickey	12/11/95	17.50	
Paul Gayda	12/18/95	8.00	
M Oettinger	1/10/96	15.00	3/8/96
Charles Frank	1/16/96	10.50	4/1/96
Sergio Duarte	1/17/96	11.00	4/5/96
T. Delessio	1/18/96	15.00	5/20/96
David Johnson	1/19/96	13.50	1/31/96
Ernest Bagley	1/22/96	10.00	
D. Cedrone	1/22/96	8.50	3/8/96
W. Frangiole	1/22/96	11/00	3/15
Marvin Horak	1/22/96	12.00	
David Pisko	1/22/96	15.00	3/8/96
R. Imkemeier	1/29/96	10.50	(He left and returned)
S. Kilpatrick	1/29/96	13.00	5/31/96
Dan Lowe	1/30/96	10.00	1/31/96
D. Costello	2/12/96	9.00	2/29/96
Joe Fales	2/14/96	16.00	3/15/96
Robert Lengen	2/26/96	17.00	5/31/96
W. Jennings	2/29/96	21.00	4/18/96
T. Kaprosch	3/4/96	14.00	

The evidence shows that after April 1996 the Company hired only four new employees for its electrical division. But these jobs would not have been to fill the needs required by the E. G. Edwards and Bradley's jobs.[4]

In looking at the evidence noted above, one can see that there were 17 individual hired during the period that the advertisement was run and *after* the Unions or their members applied for the jobs in question. Of the jobs filled, about eight were helper or apprentice jobs, requiring little or no electrical experience. And the remainder were electrician jobs that required lesser skills than a journeyman. In all cases, the wage rates and

[4] These were John Pettock hired on August 13, 1996, at $16 an hour and left on August 14, 1996; Joseph Restton hired August 5, 1996, at $12 an hour and left on August 9, 1996; Clement White hired on July 29, 1996, at $7 an hour and left on August 26, 1996; and Bruce Wolp hired on October 16, 1996, at $11 an hour and who was still employed at the time of the hearing.

benefits offered, were far below the normal pay rate for an IBEW journeyman.

The evidence shows that of the approximately 300 people who inquired about these jobs, there were 17 people who were interviewed and hired after the advertisements first appeared.[5] and 24 who were interviewed and *not* hired. (GC Exh. 22 is a group of resumes and applications which the parties stipulated constituted the group of people who were interviewed for the positions in question and who were not offered jobs.) Of this group, four had sent in resumes or had been interviewed before the advertisements were run. (Presumably, the Company had their resumes on file and decided to interview them before putting advertisements in the papers.)

Obviously, one of the defining differences between the people who were interviewed and the people who are the alleged discriminatees in this case and who were not interviewed is that none of the interviewed group expressly indicated any union affiliation. But this is also true of some of the alleged discriminatees whose union affiliation was not apparent or might only be inferred from their listed past employment. By the same token, there were more than another 200 people whose resumes or calls were received and who were also not interviewed. Unless Grimaldi had decided to interview every person who either called or sent in a resume, if he had chosen to interview about 40 to 45 people completely at random, the probability would be that some, but only a small minority of the alleged discriminatees would have been interviewed.

The fact that. Grimaldi chose not to interview every applicant was, in my opinion, a rational decision given the other work that had to do. Moreover, it would be rational to not spend time interviewing those people whom one could reasonably anticipate would not likely accept employment at the wages and benefits that were being offered. Nor is it unreasonable not to interview a person for a job which he or she is obviously overqualified. (For example offering to interview a journeyman for a helper's job is like offering to interview a surgeon for a job as an LPN.)

III. ANALYSIS

The facts show that for several years the IBEW has unsuccessfully tried, by various means, to gain a collective-bargaining relationship with the Respondent. The Company has countered the Union's efforts in a legal and appropriate manner and has never engaged in any conduct which could be interpreted as constituting coercive conduct vis-à-vis its employees.[6]

Notwithstanding the total lack of evidence to show that the Company has ever manifested any inclination to discriminate against employees because of their union membership, activities, or sympathies, the General Counsel contends that the Company refused to consider for employment and/or refused to hire certain individuals who applied for work because of their affiliation with the listed unions. This contention has no merit in my opinion, and should be rejected.

In *Wireways, Inc*., 309 NLRB 245 (1992), the Board, although finding that the Respondent violated Section 8(a)(1) of the Act by prohibiting the distribution of union literature by employees and by an isolated threat of discharge, nevertheless agreed with the administrative law judge's conclusion that the evidence was insufficient to establish that in failing to hire any of the union job applicants, the company had violated Section 8(a)(3) of the Act. As noted by the judge, id. at 251–252:

> The General Counsel must prove by a preponderance of the record evidence that Respondent in its failure to hire the alleged discriminatees was motivated by the union activity subject to the causation test of *Wright Line*, 251 NLRB 1083 (1980). Union activity includes affiliation, active or inactive union membership and past employment with union contractors. His evidence must show that the alleged discriminatees made applications for positions, that Respondent refused to hire such applicants, that Respondent knew the applicants were union members or suspected they were union members and that Respondent harbored animus against union members or sympathizers and refused to hire the alleged discriminatees because of its animus.

The General Counsel's case boils down to evidence that (a) the Respondent advertised for a number of jobs; (b) that the Unions either sent resumes on behalf of some of their members or encouraged their members to send resumes or call the Respondent and (c) that the Respondent did not respond. As noted above, there was no evidence of antiunion animus. Moreover, unlike such cases as *KRI Constructors*, 290 NLRB 802 (1988); and *AJS Electric*, 310 NLRB 121 (1993), there is no direct evidence showing that the employer's refusal to hire was motivated by the job applicant's union affiliation. (In both of those cases, the employer's agents made written notations on job applications which, in effect, admitted the illegal motivation.)

The evidence shows that, at most, there were 17 people hired for the advertised jobs after the Unions either filed resumes or their members called or submitted resumes on their own. The submitted resumes showed that they were journeymen electricians, and except for one instance, none of these people indicated that they would be willing to accept less money than what they were used to earning. The fact is that the jobs being filled by the Respondent did not require journeymen skills and did not pay journeymen wages. Indeed, a substantial number of the jobs involved were helper jobs paying $11 or less, and the others were electrician jobs requiring few of the skills required of a journeyman.

Grimaldi was given the responsibility of interviewing and hiring people for these positions and this was in addition to his normal responsibilities. He credibly testified that he spent very little time considering each resume and that he called in for interviews only a small proportion of the people who either called or sent in resumes. Grimaldi testified that he did not want to hire journeymen for nonjourneymen jobs because such people would be, in his opinion, overqualified for the work.[7]

[5] Based on the evidence, it seems that Anthony Vella, John Hickey, Paul Gayda, and M. Oettinger, were hired to work on the E. G. Edwards jobs before the advertisements appeared in the newspapers.

[6] In dismissing the allegation that an employer unlawfully refused to hire job applicants, the Board, in *Big E's Foodland, Inc*., 242 NLRB 963 fn. 3 (1979), noted that the lack of evidence showing antiunion animus was an important consideration in determining the employer's motive. See also *VOS Electric, Inc*., 309 NLRB 745 (1992).

[7] In *Bay Control Services,* 315 NLRB 30 (1994), the Board dismissed the allegation that the respondent refused to hire union applicants. The Board stated (id. at fn. 2):

> In adopting the judge's finding . . . we stress that, as the judge found, there was no showing that there were jobs available for new hires on those dates. Thus, although BCS at other times did

He also testified that there were other additional reasons not to interview to the particular people who are alleged as discriminatees in the present case, none of which I can say are demonstrably false or pretextual in nature. For example in the case of Bill Bryan, Grimaldi testified that this man's resume indicated a possiblity of instability evidenced by the large number of employers he had over a short period of time. And although not specifically explicated by Grimaldi, it would not be irrational, given the number of people in the applicant pool, to refuse to interview individuals who would not be likely to accept positions at wage rates and terms which would be far below what they were used to getting.[8]

In my opinion, the General Counsel has not presented sufficient evidence to make out a prima facie showing of discriminatory intent. Moreover, even if it could be said that such a showing was made, I think that the Respondent has established that it considered the alleged discriminatees for employment, (to the extent that Grimaldi received their resumes or spoke to them on the phone), and that he decided not to interview them for non discriminatory reasons.

CONCLUSION OF LAW

The employer has not violated the Act in any manner as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The complaint is dismissed.

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hire some applicants who, like the union members here, appeared at the jobsite seeking work, the General Counsel has failed to establish that BCS needed employees on the specific days that the union members sought work. Furthermore, BCS' primary employment need on the project was to fill low-paying helper jobs and BCS had a policy, based on past experience, against hiring overqualified employees such as the journeymen electricians alleged as discriminatees here.

[8] See, for example, *Sierra Realty Corp. v. NLRB,* 82 F.3d 494 (D.C. Cir. 1996).

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.